A

ZANIZAM AHMAD

v.

PP

B

HIGH COURT MALAYA, ALOR STAR
SOFIAN ABD RAZAK JC
[CRIMINAL APPEAL NO: 41-26-2003]
21 FEBRUARY 2007

C ***CRIMINAL LAW:*** *Identification parade - Offence of armed robbery - Whether identification by complainant vitiated - Credibility of witnesses on point of identification - Whether prosecution established prima facie case*

D ***EVIDENCE:*** *Alibi - Defense of - Credibility of witness - Whether intact - Whether magistrate erred in applying wrong standard of proof - Whether defence of alibi established - Whether there was reasonable doubt in prosecution's case*

E This was an appeal by the appellant/accused against the decision of the magistrate whereby the appellant was sentenced to 30 months imprisonment. The appeal was against both conviction and sentence. The facts of the case were that SP1, who was working as a clerk at a Singer outlet, testified that on 3 April 1999 a Malay man dressed in a white 'T-shirt' and a red helmet entered F the shop and placed a knife at her neck. The appellant had snatched her necklace and forced her to remove other articles of jewelry along with her brown wallet containing some cash. The appellant had escaped on a Yamaha sport motorcycle. Subsequently, SP1 made a police report. On 7 April 1999, the G police conducted the identification parade during which SP1 immediately identified the appellant as the person whom she could recognize. The prosecution had called SP2, the officer who had led the police team to a house and had arrested the appellant. According to SP2, he immediately administered a caution to the H appellant pursuant to s. 113(a)(2) Criminal Procedure Code (CPC) and further stated that the caution was understood by the appellant. SP2 had asked the appellant to take out the stolen items from the right pocket of his trouser. The appellant during interrogation at SP2's office was alleged to have informed SP2 I that he could tell where a Yamaha sport motorcycle was kept. SP2 further stated that the alleged knife (P2) used in the robbery was recovered on 4 April 1999. The prosecution's other witness

was SP10, the officer who had conducted the identification parade. The appellant, however, vehemently denied that he was anywhere near the site of the robbery on the mentioned date and also denied the evidence about the pieces of jewellery found in his possession. In support of the alibi defence of the appellant, SD2 (brother of the appellant) testified that on the mentioned date, the appellant was at his house. In this submission before the court, the appellant attacked the prosecution's case on two main grounds: (i) on the issue of identity of the accused; and (ii) on the defence of alibi.

Held (setting aside decision of the magistrate court; acquitting and discharging the appellant):

(1) It was submitted by the defence counsel that because SP1 had had the opportunity of seeing the appellant on 4 April 1999 prior to the identification parade, it followed that it vitiated the identification made by her on 7 April 1999. The court agreed with the submission of the appellant that the identification by the complainant (SP1) had been vitiated. Further, when SP1 attended the identification parade, the appellant was wearing a helmet but in the identification parade report there was no mention that the 11 persons including the accused were asked to put on a helmet presumably red in colour. The prosecution had failed to prove a *prima facie* case against the appellant. (paras 34, 37, 40, 41 & 47)

(2) Since the credibility of SD2 was still intact and the impeachment had failed, SD2's evidence on the whereabout of the appellant was at the time of the alleged offence should be accepted as being successful in raising a reasonable doubt. The magistrate had committed grave error in applying the wrong standard of proof on the accused. In light of SD2's evidence, there was reasonable doubt in the prosecution's case and the defence of alibi had been established. The appellant had created a reasonable doubt on the prosecution's case and therefore allowed the appellant's appeal. (paras 52, 59 & 60)

Case(s) referred to:
Chang Kim Siong v. PP [1968] 1 MLJ 36 ***(refd)***
Dalip Bhagwan Singh v. PP [1997] 4 CLJ 645 FC ***(refd)***
Dato' Mokhtar Hashim & Anor v. PP [1983] 2 MLJ 232 ***(refd)***
Illian & Anor v. PP [1988] 1 MLJ 421 ***(refd)***

A *PP v. Sarjeet Singh Halban Singh & Anor [1994] 3 CLJ 95 HC* ***(dist)***
Wong Swee Chin v. PP [1981] 1 MLJ 212 ***(refd)***
Yau Heng Fang v. PP [1985] 2 CLJ 22; [1985] CLJ (Rep) 350 SC ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 112, 113(a)(2), 402A
B Evidence Act 1950, s. 103

For the plaintiff - Jagdeep Singh Deo (Simon Murali with him); M/s Karpal Singh & Co
For the respondent - Azeezi Nordin DPP

C *Reported by Suhainah Wahiduddin*

JUDGMENT

D **Sofian Abd Razak JC:**

[1] This was an appeal by the appellant/accused against the decision of the Magistrate, Magistrate Court Kulim, Kedah on 8 Jun 2003 at the end of the defence's case whereby the appellant E was sentenced to 30 months imprisonment. The appeal was against both conviction and sentence.

[2] The appeal was fixed for hearing on 18 Jun 2006. After perusing the appeal record and reading the written submissions F filed and also after hearing further oral submissions by both learned counsel for the appellant and the learned deputy public prosecutor, the court reversed the decision of the Magistrate, Magistrate's Court and quashed the conviction and sentence.

G **[3]** The learned deputy prosecutor who was dissatisfied with the said decision has since filed a notice of appeal to the Court of Appeal. Appended herewith are the grounds for the said decision.

The Charge

H **[4]** The appellant in this case was charged as follows:

> Bahawa kamu, pada 3.4.99 jam lebih kurang 11.30 pagi di Kedai Menjual Barangan Singer, No. 6, Simpang Tiga Keladi, Kulim di dalam Daerah Kulim, di Negeri Kedah, telah melakukan rompakan keatas Sarmila a/p Subramaniam KP. No. 760421-02-5532 iaitu I seutas rantai leher emas, 3 bentuk cincin emas, wang tunai RM 90.00 dan satu beg tangan, dan semasa melakukan rompakan

tersebut telah bersenjatakan sebilah pisau yang boleh menyebabkan kecederaan parah ke atas orang tersebut, oleh yang demikian kamu telah melakukan kesalahan yang boleh dihukum di bawah Seksyen 392 Kanun Kesiksaan dibaca bersama Seksyen 397 Kanun yang sama.

[5] Section 392

Whoever commits robbery shall be punished with imprisonment for a term which may extend to ten years and shall also be liable to fine; and if the robbery be committed between sunset and sunrise the imprisonment may be extended to fourteen years, and he shall also be liable to fine or to whipping.

[6] Section 397

If at the time of committing or attempting to commit robbery, the offender is armed with or uses any deadly weapon, or causes grievous hurt to any person, or attempts to cause death or grievous hurt to any person, such offender shall be liable to be whipped, in addition to any other punishment to which he may be liable under any other section of this Code.

[7] At the end of the prosecution's case, 11 witnesses were called to give evidence and of the 11 witnesses who have testified in court, emphasis must be given to the evidence of SP1, who was the complainant in this case.

The Factual Matrix Of The Case

[8] According to the oral testimony of SP1, on 3 April 1999, at about 11am, she was working as a clerk at a Singer outlet at Simpang Tiga Keladi, Kulim, Kedah. At about 11.30am a Malay man dressed in white 'T-shirt and a red helmet, entered the shop and placed a knife at her neck. The appellant snatched her necklace and forced her to remove 3 rings and also took her brown wallet containing some cash of RM90. The appellant escaped on a red Yamaha sport motorcycle. She could not see the registration number of the said motorcycle. She immediately called her mother-in-law who then called SP1's uncle. The police was called and came to the shop. SP1 followed the police to the Kulim Police Station.

[9] At the Police Station, SP1 made a police report dated 3 April 1999 *vide* Kulim Report No: 1195/99 which was tendered and marked as exh. P1.

[10] SP1 further stated in evidence while in the shop the appellant had threatened to stab her if she did not follow what the appellant had asked her to do. SP1 was not injured and she described the knife used as a kitchen knife which is 6" to 7" in length.

[11] During the trial SP1 was able to recognize the knife allegedly used, the necklace and the three (3) rings. SP1 too could identify the appellant as the Malay man who came to her shop on that day. SP1 further informed that on 7 April 1999 she attended an identification parade, wherein she could identify the appellant.

[12] During cross-examination by the appellant's counsel, SP1 stated that the whole incident happened between 5 to 6 minutes and when the appellant took out the knife she screamed and there were people on the road in front of her shop. SP1 also mentioned that she was pregnant and was also in a state of panic.

[13] The most damaging piece of evidence elucidated during the cross-examination was the fact that on 4 April 1999 the police called her to the police station and showed the appellant to her. The police asked her whether the appellant was the person who had robbed her and she replied that she could recognize the appellant as the person. SP1 further said that the appellant was in the lockup at the material time and the police told her that the appellant was arrested in connection with the police report made by her. The police conducted the identification parade for her on 7 April 1999 and before the identification parade was held she knew who the person was. During the identification parade she immediately identified the appellant as the person whom she could recognize.

[14] The prosecution called SP2 who was the officer who led a police team to a house at No. 15, Lorong Sembilang 7, Seberang Jaya, Penang. At the said house, the police team arrested the appellant who was hiding in a cupboard.

[15] According to SP2, after introducing himself as a police officer, he immediately administered a caution to the appellant pursuant to s. 113(a)(2) Criminal Procedure Code (CPC). He further stated that the caution was understood by the appellant and whereupon SP2 had asked the appellant to take out the stolen items from his right pocket of his trouser.

[16] The appellant during the interrogation at SP2's office was alleged to have informed SP2 that he could tell where a Yamaha sport motorcycle registration number No: PBN 6085 was kept. A

[17] The appellant's counsel objected to the admission of the said evidence, and the court directed that a 'voir dire' proceeding be held to determine its voluntaries. The court after hearing submissions by both the defence and the prosecution, ruled that the statement given by the appellant in relation to where the motorcycle No: PBN 6085 was kept was given voluntarily and therefore be admitted as evidence for the prosecution. SP2 further stated that the alleged knife used in the robbery was recovered on 4 April 1999 at 7pm. The said knife was marked as P2. According to SP2, P2 was recovered from a river which was shown to by the appellant as the place where he threw the knife. B C

[18] The other witness for the prosecution whose evidence was quite relevant was SP9, Zaidi bin Ahmad. SP9 was the brother of the appellant and the owner of motorcycle No: PBN 6085. During the examination-in-chief of SP9, he could not remember who had used the motorcycle on 3 April 1999 and as far as SP9 could remember, the appellant only used the helmet which was white in colour. D E

[19] The prosecution's other witness was SP10 the officer who conducted the identification parade. Basically his evidence was nothing more than explaining what transpired during the identification parade. According to SP10 during the identification parade, SP2 was able to identify the appellant as the person who had robbed her. F

[20] Interestingly, the appellant's counsel during cross-examination did not pose any question to SP10, regarding the fact SP2 had seen the appellant prior to the conducting of the identification parade had vitiated the identification of the appellant. G

[21] Similarly, the appellant's counsel also did not put across to prosecution witness who was the investigating officer (SP11) that because SP1 has had the opportunity of seeing the appellant prior to the identification parade, that the identification of the appellant was therefore vitiated. H

[22] The defence put forward by the appellant were as follows: I

[23] The appellant was at the material time a naval personnel attached to the Royal Malaysia Navy based in Lumut. He was absent without leave (AWOL) from service and was on the run from the military police. On 3 April 1999 he stayed at his brother's house in Kulim. His wife had just delivered a baby a week earlier and at that time she was under post-natal confinement. On the same day the appellant went out to buy some goods at a shop at Taman Selasih at about 8am.

[24] Upon returning home, he did some house work. At around 11am his mother called him to inform that the military police were looking for him in Kulim. Immediately he went to his friend's house named Aliz Khan. The appellant sought the help of his friend's father to drop him and his family at the bus station at 2pm. The appellant and his family boarded a bus to Seberang Jaya, Penang where he stayed at his sister's house.

[25] On 4 April 1999, at about 10am while he was preparing to leave the house with his family, he spotted a group of men in plain clothes and assumed them to be the military police in undercover guise. He ran upstairs and hid inside a wardrobe in one of the rooms. The men opened the wardrobe door and without saying much one of the man handcuffed him. The appellant was taken in a police car and driven to Kulim Police Station.

[26] On the allegation of the robbery, the accused vehemently denied that he was anywhere near the site of the robbery on 3 April 1999. He also denied the evidence about the jewelleries found in his possession.

[27] The appellant had also tendered the cautioned statement made pursuant to s. 113 of the CPC on 6 April 1999 as exh. 'D20.' In the said cautioned statement the appellant denied knowledge of the said robbery and also denied being involved in the said robbery.

[28] In support of the alibi defence of the appellant, SD2 was called by the appellant. SD2 was the brother of the appellant who testified in court that on 3 April 1999 the appellant was at his house between 8am till 2pm. At p. 173 of the Notes of Evidence as found in the appeal record, SD2 further stated that when he returned home at 11.15am the appellant was at home but when

he returned home at about 2pm, the appellant was no longer at home. SD2 further informed the court that the police had taken statements from him, and he confirmed that what he had mentioned in court was exactly the same as what he had given in his statement. What SD2 had told the court was without any motive to get the appellant off the said charge. He was merely telling the truth in court.

[29] The evidence given by SD2 in court and the statement he had given under s. 112 CPC according to court contained discrepancies.

[30] The statement which SD2 had given to the police was shown to SD2, and SD2 was asked to explain the discrepancies.

[31] SD2 explained that possibly he could not remember the statement which he had given earlier on. SD2 was not sure of the date when the statement was given and according to him what he told the police related to the appellant's wife before she delivered her child. The learned deputy prosecutor applied to impeach SD2's credibility and after looking at the s. 112 CPC statement by SD2 the court allowed the impeachment.

[32] The learned Magistrate at p. 179 of the appeal record was of the view that although there were discrepancies between the statement given by SD2 under s. 112 CPC and his oral testimony, the explanation given by the SD2 was acceptable and therefore SD2's credibility remained intact. Subsequent to the said ruling by the learned Magistrate, SD2 further stated that 'Di antara pukul 11am-11.30am motosikal Yamaha sport itu masih berada di rumah saya.'

[33] In the submission before the court, the learned counsel for the appellant attacked the prosecution's case on 2 main grounds namely:

i) On the issue of identity of the accused; and

ii) On the defence of alibi.

A **Finding Of The Court**

On The Issue Of Identity

[34] It was submitted by the learned defence counsel that because SP1 has had the opportunity of seeing the appellant on 4 April 1999 prior to conducting the identification parade, it follows that it vitiated the identification made by her on 7 April 1999.

[35] The learned defence counsel referred to the case of *Chang Kim Siong v. PP* [1968] 1 MLJ 36 of which the facts are in all fours with the case before the court, where the court held that 'the fact that Simon Liew was invited to the police station to identify the accused not only in our opinion vitiates the subsequent identification at the parade, but raises the most grave doubts as to the whole of his evidence of identification particularly bearing in mind the circumstance in which he was required to perform that identification.'

[36] The learned deputy public prosecutor did not advance any substantive rebuttal on this issue, but relied on the identification by the SP1 at the shop where the offence was alleged to have been committed.

[37] The court was of the view that notwithstanding the fact that no questions were posed to SP10 and SP11 regarding the fact that SP1 had seen the appellant prior to conducting the identification parade it was not fatal to the defence case. The defence could still rely on the evidence of SP1 elucidated during the cross-examination. No questions as to this issue were asked by the prosecution during the re-examination.

[38] In passing, it is pertinent to reiterate that failure of the defence to cross-examine in relation to the relevant evidence of the aforesaid prosecution witnesses could amount to an acceptance of the witness testimony.

[39] In *Wong Swee Chin v. PP* [1981] 1 MLJ 212 at p. 213 Raja Azlan Shah CJM (now HRH Sultan of Perak) held, *inter alia*, that:

> failure of the defence to cross-examine the prosecution witnesses on the matter merely goes to the credibility of their testimony, ... On this point, we need only to say there is a general rule that failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of the witness' testimony.

[40] The court agrees with the submission of the learned counsel for the appellant that the identification by the complainant (SP1) had been vitiated.

[41] The court was also of the view that when SP1 attended the identification parade the appellant was wearing a helmet but in the identification parade report – P16 there was no mention that the 11 persons including the accused were asked to put on a helmet presumably red in colour.

[42] The learned Magistrate did not make any comments on the evidence given by SP1 during the brief encounter with the appellant at the shop, bearing in mind that SP1 was in a state of panic and had only 5 to 6 minutes encounter with appellant. Did she have a good look at the appellant's face?

[43] Be that as it may, the learned Magistrate in his grounds of judgment agreed that there are authorities that where in a situation the victim has had the opportunity of seeing the accused person before the identification parade was conducted it could vitiate the identification. The learned Magistrate nevertheless was of the view that it is not fair for the court to come to a view that just because of this factor that the identification by SP1 is vitiated.

[44] The learned Magistrate made reference to the case of *PP v. Sarjeet Singh a/l Halban Singh & Anor* [1994] 3 CLJ 95.

[45] The facts of the case and the case before the court are distinguishable. In *Sarjeet Singh*'s case, no evidence was led that there was in fact an identification parade conducted by the police to enable the taxi driver (victim) to identify the trio. (accused persons).

[46] In my view on the facts of *Sarjeet Singh*'s case are distinguishable as no identification parade was held whereas in the case before that court an identification parade was held.

[47] At this juncture, the court was of the view that on this issue alone, the prosecution has failed to prove a *prima facie* case against the appellant and the appellant should be acquitted without defence being called.

[48] The court however noted that the appellant's counsel conceded that a *prima facie* case had been established against the appellant without any submission being made. The learned Magistrate ruled that a *prima facie* case had been established and therefore called upon the appellant to enter his defence.

[49] The second issue which arose during the defence case was the alibi defence. Alibi notice was duly given to the prosecution pursuant to s. 402A of the CPC. The alibi witness mentioned in the notice was the appellant's brother SD2 – Zaher bin Ahmad.

[50] The prosecution alleged that there were some discrepancies in the evidence given by SD2 in court and with the statement he had given to the police under s. 112 of CPC. SD2 had explained the discrepancies to the court and the learned Magistrate was satisfied with the said explanation and ruled that the impeachment of SD2 had failed and the credibility of SD2 remained intact.

[51] The court was of the view that if the learned Magistrate had ruled that the credibility of SD2 had remained unshaken, his evidence was deemed acceptable to the court.

[52] I am of the view that since the credibility of SD2 was still intact and the impeachment had failed, SD2's evidence on the whereabouts of the appellant at the time of the alleged offence should be accepted as being successful in raising a reasonable doubt.

[53] As far as the law on the burden of proof for the accused person to 'establish his alibi' has been laid down in two (2) Supreme Court cases of *Yau Heng Fang v. PP* [1985] 2 CLJ 22; [1985] CLJ (Rep) 350 and *Illian & Anor v. PP* [1988] 1 MLJ 421 that is to raise a reasonable doubt.

[54] The Supreme Court in both its decisions did not follow an earlier Federal Court decision in *Dato' Mokhtar bin Hashim & Anor v. PP* [1983] 2 MLJ 232 where the burden of proof on the defence is on the balance of probability.

[55] The learned Magistrate in his grounds of decisions at p. 207 of his grounds of judgment adopted the principle as laid down in *Dato' Mokhtar Hashim*'s case *(supra)* and also referred to s. 103 of the Evidence Act 1950 particularly illustration (b) of s. 103 of the Act. The conclusion the learned Magistrate made with regard to alibi defence is as follows:

in raising a defence of alibi, there is necessity under the law for the accused to discharge the legal burden which is on the balance of probability imposed on him by virtue of Section 103 (illustration (b)) of the Evidence Act.

(a) A prosecutes B for theft and wishes the court to believe that B admitted the theft to C. A must prove the admission.

(b) B wishes the court to believe that at the time in question he was elsewhere. He must prove it.

[56] The learned Magistrate further at p. 210 of the grounds of judgment said that the appellant had failed to proof on the balance of probabilities that at about 11.30am on 3 April 1999, he was not at the place of the incident.

[57] Although all the three (3) cases namely *Dato' Mokhtar Hashim v. PP (supra), Yau Heng Fang v. PP (supra) and Illian v. PP (supra)* were decided by the apex courts which are in conflict with each other, the more recent case ought to be followed as reflecting the current state of laws. In the case of *Dalip Bhagwan Singh v. PP* [1997] 4 CLJ 645, the Federal Court held that when two decisions of the Federal Court conflict on a point of law, the later decision prevails over the earlier decision.

[58] In this regard, the learned Magistrate should have adopted the principle laid down in establishing alibi defence as were decided in the later cases of *Yau Heng Fang v. PP (supra)* and *Illian & Anor v. PP (supra)* ie, reasonable doubt.

[59] I am of the view that the learned Magistrate had committed grave error in applying the wrong standard of proof on the accused. In the light of SD2's evidence, there was reasonable doubt in the prosecution's case and the defence of alibi has been established.

[60] In conclusion and for the reasons adumbrated above, the court was of the view that the appellant has created a reasonable doubt on the prosecution's case and therefore allowed the appellant's appeal. The decision of the Magistrate Court is hereby set aside and the appellant be acquitted and discharged.